IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976
NO. 76-5200

---

DANIELLE and ERIC GANDY, RAFAEL SERRANO; and CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated,

Appellants-Plaintiffs,

-against-

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, MADELINE SMITH, RALPH and CHRISTINE GOLDBERG, and GEORGE and DOROTHY LHOTAN, on behalf of themselves and all others similarly situated,

Appellees.

---

# JURISDICTIONAL STATEMENT

Helen L Buttenwieser
HELEN L. BUTTENWIESER, ESQ.,
Counsel for Appellants-Plaintiffs:
Danielle and Eric Gandy, Rafael
Serrano, and Cheryl, Patricia,
Cynthia and Cathleen Wallace.
575 Madison Avenue,
New York, New York 10022
Tel: (212) 826-1600

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976
NO. _____

----------X

DANIELLE and ERIC GANDY, RAFAEL SERRANO; and CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated,

Appellants-Plaintiffs,

-against-

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, MADELINE SMITH, RALPH and CHRISTINE GOLDBERG, and GEORGE and DOROTHY LHOTAN, on behalf of themselves and all others similarly situated,

Appellees.

----------X

ON APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

# JURISDICTIONAL STATEMENT

## I N D E X

TABLE OF AUTHORITIES



JURISDICTIONAL STATEMENT

Appellants, Eric and Danielle Gandy, Rafael Serrano and Cheryl, Patricia, Cynthia and Cathleen Wallace plaintiffs below appeal from the order and judgment of a Three-Judge District Court for the Southern District of New York (Pollack, J., dissenting) entered April 14, 1976. The District Court order and judgment declared unconstitutional as presently applied New York Social Services Law §§ 383(2) and § 400 and 18 New York Code Rules and Regulations ("N.Y.C.R.R.") § 450.14* and permanently enjoining the removal of foster children from foster homes in which they have lived continuously for more than one year without a hearing on notice to the foster parents, foster child and biological parents, in accordance with procedures to be determined and promulgated. Such hearings are to be held in every case, except in emergency situations or where the foster parents request that no hearings be held (underlining mine), independent hearing officers are to be provided, and guardians ad litem are to be appointed to represent the child whenever the child's age, sophistication and ability to communicate his true feelings warrant it.

OPINION BELOW

The opinion of the District Court is not yet reported. The majority opinion is reproduced as Appendix "A", Judge

*Since renumbered 450.10.

Pollack's dissent is reproduced as Appendix "B", and the order of the District Court is reproduced as Appendix "C".

## JURISDICTION

The order of the District Court was entered on April 14, 1976. Appellants' Notice of Appeal was filed on June 10, 1976 and is reproduced herein as Appendix "D". The jurisdiction of this Court to review the instant case is conferred by 28 U.S.C. § 1253.

## STATUTES INVOLVED

New York Social Services Law, Section 383(2)

New York Social Services Law, Section 400

18 New York Code and Regulations Section 450.10

See Appendix "F" for texts.

## QUESTIONS PRESENTED

1. Is there a case or controversy where the infant defendants are not seeking to have the statutes in question declared to be unconstitutional, nor seeking the adversary proceedings sought by the adult defendants (who have not appealed) and therefore there is not conflict between the infant plaintiffs and the defendants.

2. Is there a common class when children who have been in foster placement for a year or more seek no relief which is common to all; where some children return to their own homes and their return is disputed by no one; where some children leave their foster homes after their needs change, or conditions in the foster homes change, and there is no dispute; where some children leave their foster home because the foster parents' children do not seek to have the laws that now protect them held to be unconstitutional, nor seek hearings prior to their removal.

3. Was the Court empowered to hold statutes and regulations unconstitutional as applied where the record failes to support any claim that the children have been damaged by the present procedures.



## STATEMENT OF THE CASE

A. Proceedings Below:

Appellees - Organization of Foster Families, Madeline Smith, Ralph and Christine Goldberg, and intervenors George and Dorothy Lhotan - instituted an action in the United States District Court for the Southern District of New York seeking a declaration that, after a child had been placed with them for a year, they were entitled to the same constitutional rights and the constitutional protection for these rights as is now accorded to natural parents. In implementation of those rights, they also sought a holding that §§ 383(2) and § 400 and 18 New York Code Rules and Regulations (N.Y.C.R.R.) § 450.14 (since remumbered 450.10) were unconstitutional, and asked that removal of the children placed with them be stayed until rules and regulations more conducive to protecting their rights be promulgated.

Assuming the role of "next of friend", the attorneys for the foster parents listed Eric and Danielle Gandy, Rafael Serrano (joined subsequently by Cheryl, Patricia, Cynthia and Cathleen Wallace as intervenors) all of them being minors, as co-plaintiffs.

§§ 383(2) codifies the fact that the New York State Legislature intended that the custody of, and decision making process concerning, children placed in foster homes remain with the Commissioner of Social Services, subject, of course, to the parens patriae protections provided by the Court.

§§ 400 of the Social Services and the regulations referred to above, codifies the protections afforded persons "aggrieved" by the decisions of the Commissioners.

New York City provides an additional administrative procedure for foster parents. A foster parent may obtain a

pre-removal "independent review" hearing on the record before a disinterested social services official, at which the foster parent may have counsel and present witnesses and evidence, cross-examine adverse witnesses, and have access to relevant agency files. A written decision, supported by reasons, must be issued within five days after the hearing is terminated.

Foster parents may also have the right to judicial intervention, through the custody proceeding authorized by § 651 of the New York Family Court Act and through petition for writ of Habeas Corpus. In both actions, the foster parents may be able to obtain a stay pending final disposition which would have the effect of keeping the foster child in the foster parents' home during the pendency of the proceeding. In re Custody of Mack, 367 N.Y.S. 2d 644 (Fam. 1975).

Upon commencing the within proceeding plaintiffs sought and obtained a ruling that the adult plaintiffs, all of whom had had children with them for two years or more, be permitted to represent all foster parents having children one year or more, and that the named children be permitted to represent a class of children who had been in their respective foster homes a year or more.

Thereafter, Judge Robert Carter, sensing a possible or potential conflict of interest, appointed the undersigned to represent the infant plaintiffs.

Since the appointment of the undersigned as attorney for the infant plaintiffs, the infant plaintiffs have consistently contended that the relief sought by the adult plaintiffs was contrary to the best interests of the infants, and that the plaintiffs did not properly and fairly represent a



class. As the infant plaintiffs were not seeking the relief sought by the adult plaintiffs, there in fact, was no controversy between infant plaintiffs and the defendants in this proceeding and relief granted by the majority of the Court below was not requested by the infant plaintiffs.

B. Fact Relating to Plaintiffs:

This proceeding designated as a class action, was brought by two foster families and the children residing with them individually and as a class. All of the children had been in their respective foster homes for more than 2 years.

Two of the children, a retarded nine year old boy and his six year old sister resided with a widowed foster mother, suffering from arthritis, whose foster home was no longer considered to be adequate for the needs of either child.

The third child, originally placed for temporary care, but now eligible for adoption, resided with a couple who wished to keep the boy while refusing to consider adopting him. Plans were being made to reintroduce the boy to a family member with the objective of determining whether there could be an adoptive home for him.

After the proceedings were commenced, another foster family and 4 more children, all siblings, and all having resided with this foster family for at least two years, were added as parties. These children were scheduled to go home to their own mother, two of them immediately and two of them after a stay in a foster home that was not resistant to the children's return home. This plan was subsequently approved by the Supreme Court of New York State and affirmed by the Appellate Division of the

Court and the plan has been implemented.

## ARGUMENT

### THE INSTANT APPEAL PRESENTS SEVERAL SUBSTANTIAL QUESTIONS OF LAW REQUIRING PLENARY CONSIDERATION BY THIS COURT.

1. The Court Below Erred in Finding that Adversarial Hearings Are Required to Safeguard the "Liberty" Interests of Appellant Children.

At the commencement of this proceeding, the infant plaintiffs, now being represented by the undersigned, were being represented by the attorneys who also represented the adult plaintiffs. The relief originally sought on behalf of both sets of plaintiffs was not only the declaration that the proceedings be deemed to be a class action, but also that plaintiffs be granted declaratory and injunctive relief to protect their rights under the 14th amendment. That the adult plaintiffs would have benefited had the Court below granted the declaratory relief requested - i.e. that foster parents who have children in their care for one year are entitled to the same constitutional rights as natural parents, and to the protections to which those rights would have entitled - them - is eminently clear.

That the children would not have benefited by having two sets of adults constitutionally entitled to their care and custody, with all the presumptions that such rights entail, is equally clear*.

* Fortunately this particular relief was denied by the Court below and that denial has not been appealed. In fact, the adult plaintiffs have not appealed at all.



The standard for any determination concerning a child should be what is in that particular child's best interest. The very vagueness of that standard is the only protection a child has. No child should be forced to stay in a foster home or forced to leave a foster home, because the passage of a particular period of time or the particular age of the foster parents, or the death of a foster parent or the numbers of children in a home, or any other factor which may affect different children in different ways.

Since the relief originally requested on behalf of both the adult and the infant plaintiffs was not endorsed by the Court appointed attorney for the infant plaintiffs, there was in fact, no controversy between the infant plaintiffs and the defendants. It is hard to see how the Court below could have done anything except to dismiss the proceedings, as argued by the dissenting Judge below.

2. The Court Below Erred in Declaring a Class Action in This Case Since the Needs of Children in Foster Home Placement for a Year or More Have No Common Core and Since There is No Basis for Standardization Class Action is Inappropriate.

Although the adult plaintiffs have a common goal - to retain permanently the children who has been placed with them temporarily - which made a class action appropriate, it is hard to see what the named children have in common with other children who have been in foster homes for a year or more.

The needs of foster children, whose foster homes are no longer appropriate for those needs, differ, and the determination as to what is best for an individual child cannot and should not be standarized. Furthermore, since time of the essence in matters involving children, the time consuming adversary proceedings required by the majority opinion below can cause untold

damage.

A child who needs special care because of brain damage should not lose the opportunity to be placed in an ideal situation because the foster parent does not wish to lose the child. A child who is becoming estranged from his own parents should not suffer more and permanent damage to his or her filial relationship, once the parent has been able to re-establish a home. A child who has become eligible for adoption should be placed as soon as possible in an adoptive home and should not have to languish in a temporary foster home, pending endless hearings.

The "decision-maker", referred to in the Opinion below, needs no adversary proceeding with foster parents, foster parents' attorney, natural parents, natural parents' attorney (or attorneys, if they have differing interests) present to assist her or him in the completion of a plan to place a 1-1/2 old child in a foster home with his siblings so that all can be adopted together when the parents' rights are terminated.

The decision to implement a plan to return a child to a now adequate home with his natural parents, can only be impeded by a requirement that the records of the child, kept by the agency, be examined by an attorney engaged solely to defeat such a plan.

As it is, there are too many adversary proceedings already mandated - hearings before replacement if demanded by the foster parents; "Fair Hearings" by the State; Article 78 proceedings; Appeals from the decisions in Article 78 proceedings; Writs of Habeas Corpus; Appeals from Writs - all designed for the protection of the rights of some adult, under the guise of being for the protection of the child. Steps allegedly designed to protect children can delay the appropriate decision by as much as two years, (see the Opinion of the Court below in connection with the Wallace children).

The rights of children and the need to safeguard those rights makes it highly unreasonable to lump the children, as a class, and to insist, without any evidence that the present procedures have failed, that those procedures are unconstitutionally vague and lacking in standards

3. The Court Below Erred In Basing Its Ruling on An Alleged "Grievous Loss" Without Any Evidence That Such a Loss Has Occurred Under the Present Procedure. The Record Is Bare of Any Proof that the Present Procedures Are Ineffective or Constitutionally Defective.

Some children become attached to their foster parents because they have been deprived of love at home. Others may become attached to their foster parents, because the very warmth of their own home taught them to love easily. The needs of these two sets of children differ.

Some children need a structured environment when they first come into placement but may benefit from a change from to a move permissive environment. Problems such as these cannot be resolved by setting the length of placement, the age of a child, the age of a foster parent, the rapidity of a natural parent's recovery from a disability or any other factor as requirements in reaching a determination as to whether or not to move a child from a foster home. Children's needs cannot be measured against standards.

The upbringing of children is a difficult enough process without subjecting the decisions of the trained workers to a procedure which puts emphasis on admissable testimony, examination

of documents and examination of witness designed solely to enhance the rights of the client wishing to retain possession of a child. The right to examine a child's record, if not required in the child's own interest is a serious invasion of the child's privacy.

Hearings which fail to reveal the extent to which a "witness" is not believable simply because the record contains no contradictory evidence; hearings which require the production of proof, not to convince the decision-maker who may well have been kept abreast of development as they occurred, but to refute the proof of parties competing for the child's custody; and hearings to make a record of the facts already known to which there is no objection, but which may be mandated if the lower Court's decision is adheard to, are all examples of procedures which fail in inure to the benefit of children.

The Court below held that the statutes and regulation which govern the removal of children from foster homes were unconstitutional. This holding, presumably, made for the protection of the infant plaintiffs could only have been made in response to the urgings of the attorney of the adult plaintiffs as the undersigned attorney for the infant plaintiffs had opposed such a finding, on the ground that, time being of the essence for children, procedures which delayed the decisions concerning removal or non-removal were detrimental.

Ms. Smith made no attempt to obtain a hearing as provided for by the offending statutes*. Mr. & Mrs. Lhotan were advised on June 26, 1974 that the children were to leave their home in 10 days, and by July 8, 1974 Judge Carter had granted them a temporary restraining order barring the removal. Mr & Mrs. Goldberg were able to produce even less evidence since the plans for Rafael's future were only at the discussion stage.

The record is not only barren of proof that any one has been damaged by the present procedures, but the Court below in its (majority) Opinion states that "rarely, if ever do these pre-removal conferences result in the reversal of the initial decision". This is a state of fact which is just as consistent with an appropriate procedure as with an inappropriate one.

The leading case on the issue of the necessity for having a reasonable record of damage to the persons seeking the overthrow of current procedures because of lack of due process is Socialist Labor Party v. Gilligan, 406 US 583,(1972). In that case even the distinguished dissenting judges did not disagree that, in order to reach a valid conclusion, there must be proof of actual or potential damage. They merely contended that the record before them was sufficient to make out a case for declaratory relief. (See in accord Arkansas Fuel Oil Company v. Louisiana ex rel Muslow 304 US 197, (1938, White v. Johnson 282 US 367 (1931).

The holding of the Court in all the above cases to the effect that the record must contain some evidence that the offending statutes have caused or will cause present or potential damage to the plaintiffs is even more compelling when applied this case.

In the instant case there is no proof of any damage, present or potential, to any adult or to any child as a result of the use of the present statutory regulatory provisions, nor is there any attempt to show that a modification of the allegedly

---

* The fact that the removal of the Gandy children could not be speedily implemented is a demonstration of the potential damage to children which results from the stays sought by the adults for their protection.

unconstitutional procedures will bring about any more or less detrimental result.*

Furthermore, the only explanation made by the Court below in substantiation of its holding is that "no formal manner is provided whereby they" (foster parents) "may contest it" (the removal of foster children). The further objection that under the existing procedures the foster parents may not present or examine witnesses, nor inspect the agency files is unaccompanied by any holding that this lack impairs the rights of the children.

The Court goes on to juxtapose the "burden" of the foster families as opposed to the lack of "counter-vailing obligation" on the part of the agency. Such a holding comes close to stating that the foster parents and the agency must be equipped equally so that they may battle on even terms over the possession of the child (even where the agency, in fulfilment of its obligations, wishes to return the child to the child's own home).

The majority opinion below evidences its own confusion when it alleges that it is the child who is entitled to a hearing before he or she is "peremptorily transferred from the foster home" (without any proof that the transfers have been executed peremptorily) and then goes on to cite the disadvantaged position of the foster parents, and to grant their request for formalized hearings.

---

* The removal of the children by order of the Supreme Court, Nassau County, which was approved by the Appellate Division 2nd Department, makes it clear that Mr & Mrs. Lhotan suffered no damage as a result of the present procedures.

## CONCLUSION

It is respectfully requested that the Court review the Order and Judgment of the Three Judge Court below and enter a judgment reversing the decision below.

Respectfully submitted

Helen L Buttenwieser

Helen L. Buttenwieser, Esq.,
Counsel for Appellants-Plaintiffs:
Danielle and Eric Gandy, Rafael Serrano, and Cheryl, Patricia, Cynthia and Cathleen Wallace
575 Madison Avenue,
New York, New York, 10022

Tel: (212) 826-1600

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

Leonie Carby, being duly sworn deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 460 East 21st Street, Brooklyn, New York.

On August 6th, 1976, deponent served the within Jurisdictional Statement upon the following attorneys at their respective addresses, the addresses designated by said attorneys for that purpose, by depositing true copies of same enclosed in a post-paid properly addresed wrappers, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York:

Louis J. Lefkowitz
Attorney General of the State of New York
Attorney for Defendants Shapiro and Lavine
Office and P.O. Address
Two World Trade Center
New York, New York 10047
Attn: Mark C. Rutzick
Assistant Attorney General

W. Bernard Richland, Esq.,
Corporation Counsel
Attorney for Defendants:
James Dumpson and Elizabeth Beine
Office and P.O. Address
Room 1636, Municipal Building
New York, New York 10007
Attn: Elliott Hoffman, Esq.,
Assistant Corporation Counsel

Marttie L. Thompson, Esq.,
and Toby Golick, Esq.,
Attorneys for Intervenors-Defendants
Office and P.O. Address
Community Action for Legal Services
335 Broadway,
New York, New York 10013
Attn: Louise Gruner Gans, Esq.,

Marcia Robinson Lowry, Esq.,
N.Y. Civil Liberties Union
Organization of Foster Families
for Equality & Reform
Madeline Smith, Ralph and Christiane
Goldberg, George and Dorothy Lhotan,
on behalf of themselves and all others
similarly situated
Office and P.O. Address:
84 Fifth Avenue,
New York, New York 10011

John F. O'Shaugnessy, Esq.,
County Attorney for Nassau County
Attorney for Defendant, James P. O'Neill
Office and P.O. Address,
1 West Street,
Mineola, New York
Attention: James Gallagher, Esq.,

Leonie Carby
Leonie Carby

Sworn to before me this
6 day of August, 1976

Helen L Buttenwieser
Notary Public

HELEN L. BUTTENWIESER
Notary Public, State of New York
No. 31-5555073
Qualified in New York County
Commission Expires March 30, 1978

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1976
MISC. NO._____

---

ORGANIZATION OF FOSTER
FAMILIES FOR EQUALITY AND
REFORM, et al.,

Plaintiffs,

-against-

JAMES E. DUMPSON, individually
and as Administrator of the
N.Y.C. Human Resources
Administration, et al.,

Defendants.

---

JURISDICTIONAL
STATEMENT

---

HELEN L. BUTTENWIESER, ESQ.,
Attorney for
Appellants-Plaintiffs
Office and P.O. Address:
575 Madison Avenue
New York, New York 10022
826-1600

see

76

180

183

5193